

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

DAVID N. PIERCY,

Plaintiff and Appellant,

v.

THEMIS CORDOVA RAMIREZ,

Defendant and Respondent.

F064167

(Super. Ct. No. 11CEFL03897)

**OPINION**

APPEAL from an order of the Superior Court of Fresno County. Jonathan M. Skiles, Judge.

David N. Piercy, in pro. per, for Plaintiff and Appellant.

The Law Offices of Tres A. Porter and Tres A. Porter for Defendant and Respondent.

-ooOoo-

Appellant, David N. Piercy, challenges the trial court's denial of his request for custody of, and visitation with, the infant that was born to respondent, Themis Cordova Ramirez, while she and appellant were married. The court dismissed the matter after a

court ordered paternity test disclosed that appellant was not the biological father of the child. According to appellant, the trial court erred because he is the child's presumed father. Therefore, appellant argues, the alleged biological father has no right to establish a paternal relationship.

The trial court did not err in denying appellant's custody and visitation request. Although appellant qualifies as a presumed father under Family Code<sup>1</sup> section 7611, this presumption was properly rebutted. Accordingly, the order will be affirmed.

### **BACKGROUND**

Appellant and respondent were married in January 2009 but did not live together until June 2010. The parties separated in September 2010. Respondent gave birth to the minor child, Valerie, in February 2011. Appellant was listed on the birth certificate as Valerie's father. In June 2011, when Valerie was four months old, appellant filed for dissolution.

In July 2011, appellant filed an order to show cause seeking custody of, and visitation with, Valerie. Respondent opposed the requested order. Respondent declared that appellant had created a hostile living situation and had not provided any financial support.

Respondent also requested the court to order paternity testing. According to respondent, appellant was not Valerie's father. Rather, respondent declared that Carlos Salcido, the man with whom she was living, was Valerie's father and that Salcido had provided both financial and emotional support to respondent and Valerie.

At the hearing on appellant's order to show cause, the trial court ordered both parties to participate in genetic testing with the minor child. The matter was then continued for the genetic test results.

---

<sup>1</sup> All further statutory references are to the Family Code.

At the continued hearing the court considered the genetic test results. Based on those results, the court found appellant was not the biological father and denied appellant's custody and visitation request.

### **DISCUSSION**

The Uniform Parentage Act (§ 7600 et seq.), with its various presumptions, provides the framework for making paternity determinations. (*Neil S. v. Mary L.* (2011) 199 Cal.App.4th 240, 246-247 (*Neil S.*)) Under section 7611, subdivision (a), a man is presumed to be the natural father of a child born during, or within 300 days after the termination of, his marriage to the child's mother. This presumption does not require any proof of cohabitation. (*Neil S., supra*, 199 Cal.App.4th at p. 247.) Appellant qualifies as a presumed father under section 7611, subdivision (a).

Appellant also claims he qualifies as a presumed father under section 7611, subdivision (d). Under that subdivision, a man attains the status of presumed father if he receives the child into his home and openly holds the child out as his natural child. (*Dawn D. v. Superior Court* (1998) 17 Cal.4th 932, 937 (*Dawn D.*)) However, although appellant's name is on the birth certificate and he made an effort to assert parental rights, he has never actually received the child into his home. From birth, Valerie has lived with respondent and Salcido. Thus, while appellant is a presumed father under section 7611, subdivision (a), he does not qualify as a presumed father under subdivision (d). (*Dawn D., supra*, 17 Cal.4th at p. 937.)

In any event, the presumptions under section 7611 are rebuttable. These presumptions affect the burden of proof and may be rebutted in an appropriate action by clear and convincing evidence. (§ 7612, subd. (a); *Dawn D., supra*, 17 Cal.4th at p. 937.) Although standing to challenge the presumption of a husband's paternity is limited to the child, the child's natural mother, or a presumed father, that requirement was met here.

(§ 7630, subd. (a).) It was respondent, the child's natural mother, who requested a paternity determination.

The court ordered blood test demonstrated that appellant had a 0 percent probability of being Valerie's father. This is clear and convincing evidence sufficient to rebut appellant's presumed father status.

Nevertheless, under section 7612, such rebuttal must also be "appropriate." (*In re Nicholas H.* (2002) 28 Cal.4th 56, 70 (*Nicholas H.*.) Accordingly, biological evidence will not be used to defeat an existing father-child relationship where no other man claims parental rights to the child and rebuttal of the section 7611 presumption will render the child fatherless. (*Nicholas H., supra*, at p. 70; *In re Raphael P.* (2002) 97 Cal.App.4th 716, 736.) If a "mere hypothetical man," as opposed to "a man of flesh and blood," is put forward as the father of the child, "a child could be precluded from having a loving, nurturing relationship with a committed father by a man the child may never even have met, who may be totally uninterested in the child and who cannot obtain presumed father status in his own right...." (*Nicholas H., supra*, 28 Cal.4th at p. 68.)

Moreover, under section 7612, biological fathers are not automatically preferred. Rather, in making paternity determinations, the core considerations are the integrity of the family and protection of the child's well-being. (*Neil S., supra*, 199 Cal.App.4th at p. 248.) The paternity presumptions are based on society's interest in preserving the integrity of the family and in preserving and protecting the developed parent-child relationships that give young children social and emotional strength and stability. (*Ibid.*)

Here, however, Valerie was not born into an extant marital family. (Cf. *Brian C. v. Ginger K.* (2000) 77 Cal.App.4th 1198, 1217.) Rather, appellant and respondent separated before Valerie's birth and appellant filed for dissolution of the marriage when Valerie was approximately four months old. Thus, there is no family to preserve. Additionally, although appellant may have had some contact with Valerie during the first

few months of Valerie's life, appellant never lived with Valerie in the role of a parent. Accordingly, there is no developed parent-child relationship to preserve. Finally, there is "a man of flesh and blood" who is taking on the role of Valerie's father. Therefore, this is an appropriate case for rebuttal of appellant's presumed father status.

Appellant also relies on the presumption established by section 7540. That section provides that "the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."

However, this presumption can be rebutted, albeit under limited circumstances. (§ 7541; *Miller v. Miller* (1998) 64 Cal.App.4th 111, 116.) If a motion for blood tests is filed not later than two years after the child's birth by the child's mother and the court finds, based on the court ordered blood tests, that the husband is not the father of the child, the "question of paternity of the husband shall be resolved accordingly." (§ 7541, subds. (a) and (c).)

Appellant notes that he and respondent were cohabiting at the time respondent discovered she was pregnant. Therefore, appellant argues, the conclusive presumption under section 7540 applies. However, whether or not appellant and respondent were cohabiting within the meaning of section 7540, the circumstances necessary to rebut this presumption exist. The blood tests, ordered when Valerie was approximately six months old and based on respondent's motion, led the experts to conclude, and the court to find, that appellant was not Valerie's father. Thus, under section 7541, the question of paternity had to be resolved accordingly.

In sum, appellant's status as a presumed father was rebutted by clear and convincing evidence. Moreover, this was an appropriate case for such rebuttal. Therefore, the trial court did not err in denying appellant's motion for custody and visitation.

**DISPOSITION**

The order is affirmed. No costs are awarded.

---

LEVY, Acting P.J.

WE CONCUR:

---

CORNELL, J.

---

DETJEN, J.